No. 93-643

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

BESSEMER & LAKE ERIE RAILROAD COMPANY,
Petitioner,
v.
REPUBLIC STEEL CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF RESPONDENTS C.D. AMBROSIA TRUCKING COMPANY, ERIE-WESTERN PENNSYLVANIA PORT AUTHORITY AND CODAN CORPORATION, AND TAURO BROTHERS TRUCKING COMPANY

LAWRENCE R. VELVEL
MICHAEL L. COYNE
27 Hickory Lane
Windham, NH 03087
Counsel for C.D. Ambrosia Trucking Company, Erie-Western Pennsylvania Port Authority and Codan Corporation

JERRY S. COHEN
ANN C. YAHNER
COHEN, MILSTEIN, HAUSFELD & TOLL
1401 New York Avenue, N.W.
Suite 600
Washington, D.C. 20005
Counsel for Tauro Brothers Trucking Company

BRUCE J. ENNIS, JR.*
DONALD B. VERRILLI, JR.
CARL S. NADLER
KIT A. PIERSON
THERESA A. CHMARA
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

1. Whether the holding of *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922), should be expanded to bar antitrust damages for any party—customer or competitor—when: (a) plaintiffs did not challenge the lawfulness of any rate filed with the Interstate Commerce Commission and did not seek any rebate of alleged filed-rate overcharges; (b) damages were not measured by reference to hypothetical regulated railroad rates; (c) the jury was specifically instructed that liability could not be premised on rate-related claims; and (d) the court of appeals "conclude[d] from the evidence produced that . . . plaintiffs proved at trial an antitrust conspiracy that was not grounded in rate-related claims."

2. Whether, assuming *Keogh* is expanded to bar such antitrust damage claims by shippers, it should *further* be expanded to bar damages for competitors, where: (a) this Court's decisions and those of the lower courts have consistently declined to apply *Keogh* to competitor claims; (b) the competitor claims do not create the risk of discriminatory rebates that was the concern in *Keogh*, and (c) the competitors' claims are not measured by reference to hypothetical rates that would require Interstate Commerce Commission approval.

3. Whether *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), should be extended to bar the antitrust damage claims of the steel company plaintiffs, notwithstanding that the court of appeals in this and a related case held those steel companies to be directly-injured victims of a conspiracy to exclude competition.

RULE 29 STATEMENT

Pursuant to Rule 29.1, there are no parent or subsidiary corporations to be listed.

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Respondents C.D. Ambrosia Trucking Company (Ambrosia), Erie-Western Pennsylvania Port Authority and Codan Corporation (Erie), and Tauro Brothers Trucking Company (Tauro) respectfully oppose the petition for certiorari.

STATEMENT

There is nothing "extraordinary" about this antitrust case—except, perhaps, the audacity and scope of the illegal conduct at issue. In a 1989 jury verdict, Petitioner Bessemer & Lake Erie Railroad (B&LE) was held responsible for its leading role in a destructive 25-year

conspiracy that unlawfully monopolized the transportation of iron ore to this nation's steel mills.[1] In a prior criminal case, B&LE pled *nolo contendere* to antitrust charges based on its role in the conspiracy. *See United States v. Bessemer and Lake Erie Ry. Co.*, 717 F.2d 593 (D.C. Cir. 1983).

The Third Circuit's judgment in this case does not warrant plenary review. B&LE does not dispute the trial court's finding that "[l]iterally thousands of documents, from the railroads' own files, establish beyond dispute the existence of an illegal conspiracy."[2] Nor does B&LE challenge the Third Circuit's holding, agreeing with the D.C. Circuit in the criminal case, that the Interstate Commerce Act afforded the conspirators no antitrust immunity. B&LE neither denies its role in the conspiracy nor questions the fairness of the proceedings that awarded compensation for its effect. B&LE instead asks this Court to immunize its misconduct from treble damages through a sweeping extension of the *Keogh* doctrine. Even with respect to this issue, however, B&LE does not challenge the instructions given the jury. Instead, B&LE seeks to manufacture a need for plenary review by presenting an incomplete and seriously distorted picture of what was decided below.

A. The Facts

Traditionally, iron ore in mud-like form was transported from mines in Michigan, Minnesota and eastern Canada across the Great Lakes on ships known as "bulk-

[1] Although B&LE describes itself as a "small, 200-mile railroad," it was one of the largest carriers of iron ore in the nation during the period in question, and was established for the principal purpose of transporting ore from Lake Erie to the steel mills of Ohio and Pennsylvania.

[2] Appendix to Petition for Certiorari (Pet. App.), 97a (opinion denying motion for judgment notwithstanding the verdict).

ers." On arrival at docks on the south shore of Lake Erie, the ore was unloaded by huge and extremely expensive equipment, including large cranes known as huletts. From the docks, B&LE and other railroads transported the ore to steel mills in Ohio and Pennsylvania.[3] So long as ore remained in mud form, this transportation system was largely insulated from competition because the railroads controlled the huletts needed to unload the "bulker" ships, and the rail lines from the docks to the mills.

In the early 1950s, the advent of "pelletized" ore portended three important changes in ore transportation. First, because pelletized ore could be unloaded with a conveyor belt carried on the ship (rather than huletts on the docks), a larger and more efficient type of vessel—the "self-unloader"—could replace traditional bulkers. Second, because huletts and other heavy equipment were no longer necessary to unload ore, "private docks" not owned by the railroads could compete for iron ore business without facing the entry barrier of prohibitive capital investments. Third, because railroads could not bar private docks from dealing with motor carriers, trucks could compete with railroads for transportation of ore to the mills. Pelletized ore therefore made possible a new transportation system—self-unloaders, private docks, and trucks—that could move ore at a cost far lower than the monopoly rates charged by the railroads.

The railroads' own documents demonstrate their collective determination to squelch this threat to their monop-

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[3] Other railroads, including the New York Central (NYC), the Chesapeake & Ohio Railway Co. (C&O), the Baltimore & Ohio Railroad Company (B&O), the Norfolk & Western Railway Company (N&W), Penn Central Corp., and the Consolidated Rail Corporation (Conrail), also transported ore and were defendants in this case. Defendants other than B&LE settled before trial, or were dismissed from the case.

oly profits. As early as 1956, the railroad conspirators recognized the risk of a "switch in the movement of raw ore from 100% in bulk freighters . . . to substantial self-unloader movements." Court of Appeals Appendix (CA App.) 6460. Concerned that "other shippers may enter the picture and self-unloaders may . . . go to other [nonrailroad] docks," the railroads convened secret meetings at which they concluded that "something must be done to overcome the threat such inexpensive facilities, which could spring up anywhere, are to our established ore facilities and charges." CA App. 6462. Indeed, railroad documents confirm their fear that "the economies involved [would entice] additional public docks in the iron ore trade to compete with the railroads, [which was] the cause of the greatest alarm" to the conspirators. CA App. 6576.[4]

The railroad conspirators' response to this threat was extensive and closely coordinated. To forestall the proliferation of private docks, the railroads agreed to place restrictive covenants in leases or sales of railroad-owned dock properties to "limit[] the commodities to be handled" by those who leased such properties. CA App. 6479. Such restrictions were a principal means by which the conspiracy achieved its objectives. Thus, for example, one railroad leased dock property to a nonrailroad but provided it could not be used as a "site for handling and storage of . . . iron ore and coal received in lake vessels." CA App. 6589; *see also* CA App. 6480.

For years, the railroad conspirators blocked efforts by Respondent Erie to buy or lease an abandoned railroad-owned dock for a self-unloading iron ore facility. One railroad conspirator described the land sought by Erie as of "great strategic value to any party hoping to put together a pellet handling facility." CA App. 7138. Per-

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[4] *See also*, CA App. 6460, 6890, 7460, 2459-60, 2464-65, 2470, 2442-44, 6528, 6575, 6596.

ceiving "grave dangers . . . inherent in giving any non-railroad operator access to facilities suitable for the handling of iron ore pellets," CA App. 7482, the conspirators agreed to "resist" any sale or lease "in the absence of protective measures to prevent the use of any Erie waterfront property for coal and ore purposes." CA App. 7155. Thus, the railroads refused to sell Erie the dock unless the deed was "restricted so no competitive coal or ore facilities might be erected." CA App. 6889. As one conspirator boasted to the others, "[w]e have strongly resisted for years all proposals to sell or lease the Erie Ore dock." CA App. 7952.

The railroad conspirators also suppressed competition by agreeing to boycott private docks. Once the possibility of unloading pelletized ore on private docks became a real threat, several railroads, in furtherance of the conspiracy, *cancelled* competitively priced rail service from those properties to the steel mills.[5] Other railroads consistently refused to provide competitive rail service from private docks to the mills.[6] Railroad documents make clear that these actions were taken for the express purpose of suppressing the development of self-unloader technology and competition from private docks.[7]

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[5] The B&O railroad eliminated such service from three private docks because it "would not have any control over the charge that may be assessed against self-unloaders that may discharge iron ore at these particular spots." CA App. 6464, 6469.

[6] CA App. 6527, 6535, 6876, 6895, 7994, 8256.

[7] CA App. 8413 (competitive rail service from private docks "would unquestionably result in private docks being preferred"). Iron ore was *never* transported under general railroad "class rates" (which were "catch-all rates" applicable to any commodity not otherwise specifically provided for), because those rates were two to three times higher than the "iron ore line haul" rates. B&LE concedes that without iron ore line-haul rates the private "docks were not economically viable." Pet. at 14 n.9.

Ambrosia, Tauro and other trucking companies were also targets of the conspiracy. One railroad memorandum warned that "[w]e do not want to provide an area at which a self-unloader dock for iron ore pellets may be constructed which, in turn, might be used to truck iron ore." CA App. 7151, 7278. Conspirators cautioned that an unrestricted lease of railroad-owned property to a would-be competitor "would, in effect, create a [non-railroad] dock, and the ore could . . . be trucked." CA App. 7475. A leading conspirator warned "[t]here is one thing about rates from a private facility which has always bothered me, and that is the possibility of trucking." The railroads feared that providing competitively priced service from a non-railroad dock would enable such docks to handle pelletized ore, which in turn "might influence a movement by truck." CA App. 6626. The president of one conspirator railroad warned the president of another that there were "many other facets of [a particular] proposal which are disturbing, including the possibility of trucking ore from a private facility." CA App. 7461.

The conspirators also agreed to refuse to accept any self-unloaders at their docks,[8] or to charge the same dock handling rates for self-unloaders as for bulkers, thus imposing charges for unloading services neither required nor performed by the docks for those vessels. *See United States v. B&LE Ry. Co.*, 717 F.2d at 601 (noting that this conduct was illegal and not immunized by the Interstate Commerce Act). They undertook this course for the specific purpose of suppressing incentives to develop self-unloaders by eliminating cost savings self-unloaders would otherwise have accomplished.

The railroads agreed to forego independent action, and used coercion to ensure fealty to the conspiracy's objec-

[8] B&LE refused to handle self-unloaders at Conneaut, Ohio. Penn Central refused to handle self-unloaders at Ashtabula. CA App. 7453. N&W refused to handle self-unloaders at its Huron Dock. CA App. 6495, 7391, 6894, 7311, 7317.

tives. For example, the conspirators convened a meeting in 1971 in response to a proposal by C&O to lease private dock space to a potential competitor. A B&LE memorandum reports a "negative reaction" of the conspirators that was "immediate and vocal." One railroad indicated that it had "resisted similar pressures to establish comparable arrangements at the ore docks at Erie." The conspirators threatened "rate wars" on commodities important to C&O's revenues if C&O implemented its proposal. CA App. 7456. A follow-up letter from the president of one railroad noted that C&O's proposal was "of great concern to . . . all of the major Eastern lines," and reiterated that the "competitive reaction of other rail carriers would be immediate, maybe even over-compensatory." CA App. 7460-7462. C&O's proposal was withdrawn.

B&LE was integral to this conspiracy from its inception, and participated in every significant conspiratorial meeting. CA App. 6457, 6483, 6631, 6897.[9] B&LE also went to great lengths, along with the other conspirators,

[9] During the period of the conspiracy, B&LE was a wholly owned subsidiary of U.S. Steel. Because U.S. Steel was the last steel company to pelletize its ore, it had significant incentives to delay the development of self-unloader technology in order to deprive its competitors of a transportation cost advantage. CA App. 7496, 4317, 4324-27. B&LE chaired a special committee that blocked a B&O proposal to handle self-unloaders. At B&LE's instigation, the conspiracy brought N&W back in line when it began to handle a few self-unloaders. CA App. 6883, 6887, 6894. B&LE called a meeting to discuss ways to combat the competitive threat of trucks. CA App. 135. B&LE then chaired a "Special Committee" that monitored and laid plans to combat truck competition. The Committee met in B&LE's offices, CA App. 7943, where B&LE's report on trucking was discussed. CA App. 7990, 7955. Acting as watchdog for the conspiracy, B&LE notified the other conspirators when it discovered that the Pittsburgh & Lake Erie Railroad had established competitive rail service from the private Pinney Dock. CA App. 8394. The notice enabled conspirators (including B&LE) to discuss retaliatory actions against the Pittsburgh & Lake Erie, and the actions were then taken by the appropriate conspirators. CA App. 8410.

to conceal the conspiracy "so as to avoid directing attention" to their actions "and possibly also lay ourselves open to litigation." CA App. 6496. Railroad officials repeatedly met in secret, deliberately ignoring the procedural requirements of the rate bureaus (which permitted them to set rates collectively only in public meetings), and repeatedly took steps to ensure that "[t]here was no committee record" of these meetings and that minutes were "not disclosed to anyone in any manner." CA App. 7313.[10]

Despite the railroads' efforts, the conspiracy eventually came to light as a result of a civil suit filed in 1980. Criminal indictments, resulting in B&LE's *nolo contendere* plea, followed in short order.

B. District Court Proceedings

Between 1982 and 1984, five steel companies, three private docks (including Erie), and three trucking companies (including Ambrosia and Tauro) filed separate antitrust actions against B&LE and other railroads seeking treble damages for injury inflicted by the conspiracy. The cases were consolidated in the Eastern District of Pennsylvania.

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[10] The conspirators' conduct violated the Interstate Commerce Act not only because the conspirators shaped their strategies in clandestine meetings that were not subject to public scrutiny, but also because the conspirators agreed to forego their right to deal independently with private docks and trucks, with obedience to that agreement enforced through coercion by the conspirators. *See generally United States v. Baltimore & Ohio R.R.*, 538 F. Supp. 200, 207-09 (D.D.C. 1982), *aff'd sub. nom. United States v. B&LE Ry. Co.*, 717 F.2d 593 (D.C. Cir. 1983). Thus, as the jury specifically found, B&LE's conduct in the conspiracy was not "reasonable" under "the regulatory policies under which defendant operated." Indeed, the jury found that B&LE lacked even a "good faith belief" that its conduct "was required by ICC regulations." CA App. 1902.

1. *Pretrial Proceedings*

The district court dismissed several damage claims before trial. In particular, applying *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922), the court dismissed "[a]ll rate-related claims asserted by the steel company plaintiffs," *i.e.*, all claims in which plaintiffs sought a rebate of overcharges actually paid to the railroads for tariffed services. *See* Pet. App. 21a, 29a.

2. *Trial Proceedings*

Trial commenced in May 1989. The liability phase lasted six weeks. The jury heard the testimony of dozens of witnesses, and reviewed thousands of documents (most from the railroads' files). At the close of the evidence, the trial court gave careful and lengthy instructions informing the jury that B&LE and the other conspirators would be entirely immune under the antitrust laws "for agreements and understandings related to tariffs and relating to agreements affecting tariffs as long as they were in compliance with the Rate Bureau procedures and consistent with that." CA App. 5002.

The district court charged the jury that, in addition to immunity under the Interstate Commerce Act, B&LE could claim the benefit of the *Keogh* damages bar to the extent plaintiffs sought a rebate for alleged overcharges:

> [O]nce a rate is being charged pursuant to a duly filed tariff which has not been disapproved by the Interstate Commerce Commission, then it is conclusively presumed so far as the law is concerned that that charge is a reasonable one. And what that means is that nobody can claim damages under the antitrust laws or any other law—no shipper who pays railroad rates, who pays freight charges to a railroad—can complain to have been damaged either by the antitrust laws or by other laws merely by the allegation that those charges were higher than they should have been. As long as those charges were pursuant to a duly filed tariff, they are presumed to

> be reasonable; and the place to challenge their reasonableness is with the Interstate Commerce Commission and not in a court of law in an antitrust case.

CA App. 4982. The court specifically repeated the charge that "nobody can make a claim for damages measured by or based upon the fact that they paid a rate authorized by an ICC-approved tariff by claiming that that rate was too high." CA App. 5029-30.

The liability jury returned verdicts in favor of all plaintiffs except one dock company (Reaney). The jury specifically found, in a series of interrogatory responses, that B&LE participated in the conspiracy to suppress competition in the transportation of iron ore by delaying the development of self-unloader technology, precluding competition from private docks, and impeding truck competition, and that this conduct was a material cause of injury to all plaintiffs (except Reaney). The jury expressly found that B&LE's conduct was not undertaken in conformity with the rate bureau procedures of the ICA, and was not premised on a good faith belief that its conduct was within this ICA immunity.

A separate damages jury was then empaneled. Using typical methods of damage calculation, plaintiffs estimated the costs, prices and profits that would have existed but for the illegal conspiracy. Erie, Ambrosia, Tauro and the other competitor plaintiffs estimated the profits they would have earned on the iron ore business from which they were foreclosed. The steel companies estimated the transportation cost savings they would have achieved had they been able to use competitors of the railroads. Plaintiffs' damage estimates were carefully integrated to preclude duplicative awards. For example, no dock or truck company claimed lost profits on business claimed by another dock or truck company. The damages jury awarded some, but far from all, of the damages sought by plaintiffs—and expressly denied certain categories of damages.

3. *Post-trial Proceedings*

B&LE challenged the liability and damages findings in a motion for judgment notwithstanding the verdict. The district court rejected the motion, concluding that "[l]iterally thousands of documents, from the railroads' own files, establish beyond dispute the existence of an illegal conspiracy . . . to prevent self-unloading vessels, private docks, and trucking firms from gaining a foothold in the transportation of ex-lake iron ore." Pet. App. 29a.

With respect to *Keogh*, the court acknowledged that "[r]ailroad rates and charges which are subject to the jurisdiction of the Interstate Commerce Commission are conclusively presumed to be reasonable, hence the defendant cannot be held liable for damages under the antitrust laws because a plaintiff has been required to pay such rates or charges." Pet. App. 95a. But, the court held,

> *these issues were fully explained to the respective juries, and there is no present contention that either charge was erroneous.* The liability jury found that the defendant had, indeed, violated the antitrust laws by conduct which was *not* immune from antitrust scrutiny, and the damages jury found that plaintiffs' damages were attributable to *non-immune* conduct. . . . These findings are amply supported by the evidence.

Pet. App. 96a (emphasis added).

C. The Third Circuit's Decision

The Third Circuit affirmed the district court in all respects relevant to B&LE's petition. The appeals court recognized that the district court had dismissed all claims seeking rebates of overcharges for tariffed services, and affirmed the district court's conclusion that "plaintiffs proved at trial an antitrust conspiracy that was *not* grounded in rate-related claims" of the kind barred by *Keogh*. Pet. App. 34a (emphasis added). The court thus applied the recognized distinction between "overcharge"

claims, which *Keogh* bars, and claims that regulated entities sought to preclude market entry by new competitors through a broad range of anticompetitive conduct. Indeed, the court specifically held that "it is fully consistent with *Keogh* . . . to accept these [railroad] rates as lawful and nonetheless to conclude that through non-rate activities, particularly the restriction on the sale or lease of dock space and the refusal to deal with potential competitors, the railroads effectively retarded entry of lower cost competitors to the market." Pet. App. 32a.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS CORRECTLY APPLIED SETTLED LAW RESPECTING *KEOGH*.

The *Keogh* issues raised by B&LE do not warrant plenary review. B&LE opposed certiorari on similar questions five years ago in *Pinney Dock and Transport Co. v. Penn Central Corp.*, 838 F.2d 1445 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988), but now urges this Court to grant review to adopt a sweeping ruling expanding *Keogh* beyond its current well-established limits. As will be demonstrated, plenary review is even less warranted now than it was in *Pinney*.

A. The Limits of the *Keogh* Doctrine Are Well-Established and Were Properly Respected by the Court of Appeals.

B&LE's principal plea for review rests on an unprecedented and untenable characterization of the *Keogh* doctrine, including its application to shippers in market preclusion cases. The Third Circuit's application of *Keogh* was entirely correct, and presents no genuine conflict with a decision of this Court or any court of appeals.

1. *Keogh* provides antitrust violators with a narrowly circumscribed protection from treble damages. In every case in which this Court has recognized a *Keogh* bar to

treble damages, a shipper complained that filed rates it actually paid a carrier were inflated as a result of price-fixing, and invoked the antitrust laws to seek what amounted to a rebate of the allegedly excessive part of the rate. In *Keogh* itself, the Court made clear that the bar applied only to an individual shipper's claims for damages that, "like a rebate," would refund to the shipper the difference between the rate paid the carrier and the lower rate the shipper allegedly would have paid the carrier absent the price-fixing. 260 U.S. at 162. In *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945), the State of Georgia sought damages as *parens patriae* on behalf of its citizens for alleged rate overcharges resulting from price fixing. And in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, plaintiffs alleged that the filed rates they paid for motor carrier transport were inflated as a result of price-fixing, and sought damages "measured by th[e] difference" between the inflated rate and the rate that allegedly would have been filed with the ICC absent the price-fixing. 476 U.S. 409, 413 (1986).[11]

Keogh has been limited to cases where shippers effectively seek "rebates" of filed-rate "overcharges" because *Keogh*'s policy rationales apply only in that narrow circumstance. The principal justification for the damages bar is protection of "the paramount purpose of Congress [in enacting the ICA]—prevention of unjust discrimination." 260 U.S. at 163. That purpose "might be defeated" if one shipper recovered a *de facto* "rebate" of filed rates by succeeding in litigation while other shippers continued to pay the filed rate. *Id.* *See also Square D*, 476 U.S. at 423 n.30 ("the *Keogh* concern" was with antitrust damages "operating as a discriminatory rebate");

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[11] As this Court noted in *Square D*, the Second Circuit, after barring damages for tariff "overcharges," remanded to the district court to permit plaintiffs to "amend their complaints to state possible claims for damages not arising from the filed tariffs" paid by the plaintiffs to the carriers. 476 U.S. at 417 n. 19; *id.* at 414. The Second Circuit's ruling was affirmed by this Court.

id. at 423 ("the expressed concern [was] about unfair rebates"). *Keogh* also sought to protect the ICC's regulatory prerogatives by precluding courts from speculating as to what alternative shipper rates the ICC would have approved for tariffed service in lieu of the excessive rates caused by the antitrust violation. 260 U.S. at 163-164.

Limiting *Keogh* to shipper rebate claims is entirely consistent with, if not required by, the established principle that exemptions from antitrust liability are "strongly disfavored and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." [12] Confining *Keogh* to these recognized boundaries is also consistent with the clear import of *Square D* that "*Keogh* . . . was unwise as a matter of policy" and persists solely for reasons of *stare decisis*. 476 U.S. at 420, 423-424. As *Square D* makes clear, there is simply no warrant for extending *Keogh* beyond its traditional narrow scope.

2. The limits of *Keogh* are equally settled in the courts of appeals. Courts apply *Keogh* where shippers use the antitrust laws to seek what amounts to a rebate for alleged overcharges paid as a result of price-fixing.[13] But courts refuse to apply *Keogh* where—as here—plaintiffs do not seek a rebate of the difference between what they actually paid the carrier and what they would have paid the carrier in the absence of price-fixing, but instead seek to recover non-overcharge damages (lost profits or busi-

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[12] *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-351 (1963); *see also Nat. Gerimedical Hospital & Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 388-389 (1981); *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973).

[13] *E.g., In re Wheat Rail Freight Ry. Antitrust Litig.*, 759 F.2d 1305 (7th Cir. 1985), *cert. denied sub. nom., Little Crow Milling Co. Inc. v. Baltimore & Ohio R.R.*, 476 U.S. 1158 (1986); *H.J. Inc. v. Northwestern Bell Telephone Co*, 954 F2d 485 (8th Cir.), *cert. denied*, 112 S.Ct. 2306 (1992).

ness losses) inflicted by anticompetitive behavior designed to destroy competitors and suppress competition in a regulated industry. *See Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 679 (9th Cir. 1985); *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau*, 690 F.2d 1240 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983); *Litton Systems, Inc. v. AT&T*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); *City of Kirkwood v. Union Electric Company*, 671 F.2d 1173 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir. 1981); *City of Mishawaka, Indiana v. Indiana & Michigan Electric Company*, 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978). In each of these cases, the court rejected the claim that *Keogh* should bar all antitrust damages—not just "overcharge" damages—whenever market preclusion in a regulated industry is at issue.[14]

3. The *Keogh* rulings of the courts below expressly followed this well-established body of law. The district

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[14] The distinction is also well established in the district courts. *See Capital Freight Serv. v. Trailer Marine Transport*, 704 F. Supp. 1190, 1192, 1197 (S.D.N.Y. 1989) (carriers' "various anticompetitive actions" give rise to treble "damages not for the increased rates it was forced to pay, but for lost sales and profits and the going concern value of its destroyed business"); *Delaware & Hudson Ry. Co. v. Conrail*, 654 F.Supp. 1195, 1205 (N.D.N.Y. 1987) ("D&H seeks to establish that Conrail engaged in a broad pattern of conduct specifically designed to eliminate D&H as a competitor. The plaintiff's damages will be measured not by the difference between existing rates and some hypothetical rates, but by business losses it has allegedly sustained"); *Trans-Kentucky Transport v. L&N R. Co.*, 581 F.Supp. 759, 767 (E.D. Ky. 1983) ("Plaintiffs do not ask the Court simply to find specific rates to be unreasonably high and to lower them retroactively to reasonable levels. Instead, plaintiffs seek to establish that defendants engaged in a broad pattern of conduct, including but not limited to the manipulation of rates, specifically designed to destroy the TTI project as a competitor. Damages would be measured . . . by the business losses plaintiffs have sustained").

court applied *Keogh* to dismiss all claims seeking rebates for alleged overcharges by the railroads for tariffed services provided to the shipper plaintiffs. The court was careful to instruct the jury that "no shipper who pays railroad rates, who pays freight charges to a railroad[,] can complain to have been damaged either by the antitrust laws or by other laws merely by the allegation that those charges were higher than they should have been," so long as the rates had been filed with the ICC. But the court properly permitted the jury to consider all "non-rate claims" by shippers and competitors, *i.e.*, all claims that did not seek rebates for alleged overcharges for railroad services actually provided to plaintiffs. CA App. 4982.

The Third Circuit also observed the well-established distinction between overcharge rebate claims and market preclusion claims. As the court held, "it is fully consistent with *Keogh* . . . to accept these [railroad] rates as lawful and nonetheless to conclude that through non-rate activities, particularly the restriction on the sale or lease of dock space and the refusal to deal with potential competitors, the railroads effectively retarded entry of lower cost competitors to the market." Pet. App. 32a. B&LE does not dispute that *Keogh* has no application to railroad conduct precluding the emergence of private docks—and as the Third Circuit concluded, that conduct "eliminated much of the economic incentive to use self-unloaders." Pet. App. 19a.

As the Third Circuit recognized, the policies underlying *Keogh* have no application here. None of the plaintiffs sought damages for the difference between what shippers paid the railroads and what they would have paid the railroads absent the conspiracy. And none of the damages awarded even remotely pose a threat of rate discrimination among shippers. Damages to the dock and truck company plaintiffs could not amount to a *de facto* rebate because those plaintiffs did not pay any railroad for any carrier services. The primary injury suffered by the

steel company plaintiffs was the transport savings they lost because they could not use self-unloaders to transport ore across Lake Erie. The ICC has no power to compensate the steel companies for those damages. Nor does the other component of the steel companies' recovery—lost savings for dock handling charges—implicate *Keogh* policies. The steel companies based their damages case entirely on estimates of handling charges they would have paid to nonrailroad docks absent the conspiracy to suppress the development of such docks. Because those rates were entirely unregulated, no judgment as to what lower rates the ICC would have approved for the service is required.

4. There is no basis for B&LE's claim that the Third Circuit's application of these settled principles *"creates* a division among the courts over whether the doctrine applies to conspiracies involving mixed rate and non-rate activities to exclude competitors from a market." Pet. at 10 (emphasis added). Suggesting that the present case "created" a conflict, B&LE inexplicably ignores the large number of *prior* cases that, like the Third Circuit here, confine *Keogh* to overcharge rebate claims by shippers. Instead, B&LE points to the Sixth Circuit's 1988 opinion in *Pinney Dock and Transport Co. v. Penn Central Corp.*, 838 F.2d 1445, and the Fourth Circuit's *unpublished* affirmance of *Lifschultz Fast Freight, Inc. v. Consol. Freightways Corp. of Delaware*, 805 F.Supp. 1277 (D.S.C. 1992), *aff'd mem.*, 998 F.2d 1009 (4th Cir.) (Table), *pet. for cert. filed*, No. 93-456 (Oct. 4, 1993), as its sole evidence that "the holding below flatly . . . conflicts with holdings of at least two other circuits." Pet. at 14. The alleged conflict is illusory.

Lifschultz Fast Freight presents no conflict. The Fourth Circuit plainly did not consider its unpublished ruling to be in conflict with the law of any other Circuit because Fourth Circuit rules require publication if a decision "creates a conflict with a decision in another circuit." Fourth Circuit Internal Operating Procedure 36.4(v). In-

deed, the court's order plainly states that "[u]npublished opinions are not binding precedent in this circuit." [15] Moreover, the district court in *Lifschultz* raised *Keogh* as an *alternative* ground for decision after granting summary judgment on all claims because the plaintiff failed to produce evidence to prove them. *Lifschultz Fast Freight, Inc. v. Consol. Freightways Corp. of Delaware*, 805 F. Supp. 1277, 1289-94 (D.S.C. 1992). The unpublished Fourth Circuit order generally approved the district court's reasoning as "sound," but did not adopt or endorse the court's *Keogh* ruling. For these reasons, the unnecessary discussion of *Keogh* in the district court's *Lifschultz* opinion plainly creates no need for plenary review. In any event, *Lifschultz* involved a direct attack on the legality of filed rates. It thus does not raise issues remotely like those raised in the present case. 805 F. Supp. at 1282, 1294.

Nor does the Sixth Circuit's 1988 decision in *Pinney* present a genuine conflict. In that case, as in this one, the court held that *Keogh* did *not* bar damages for exclusionary conduct such as refusal to lease dock sites to plaintiffs and harassment of competitors. 838 F.2d at 1457. The Sixth Circuit then stated that "it would . . . appear that" other claims like those at issue here would be barred by *Keogh*, but "[r]ather than requiring outright dismissal of these claims," the court gave plaintiffs "an opportunity on remand to amend their complaint in order to clarify these allegations to state a claim for damages consistent with *Keogh*." 838 F.2d at 1458. Thus, the Sixth Circuit did not finally resolve the issue on which B&LE claims there is a conflict.

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[15] *See* Dkt. No. 92-2523 (4th Cir. July 6, 1993), slip op. at 2. As this Court has noted, unpublished dispositions have "an assumed lack of precedential effect." *C.I.R. v. McCoy*, 484 U.S. 3, 7 (1987). In the Fourth Circuit, the court will cite unpublished opinions only in "unusual circumstances" and "disfavor[s]" litigants' citation of them. Fourth Circuit Internal Operating Procedure 36.6.

Moreover, because *Pinney* was decided on interlocutory review, the Sixth Circuit did not have the benefit the Third Circuit had here of a full factual record after an extensive trial and detailed jury interrogatory responses finding specific misconduct that plainly falls outside the scope of *Keogh*. Accordingly, the factual underpinnings of the decision were different in *Pinney* respecting the critical issue on which B&LE posits a conflict. For these reasons, *Pinney*'s status is far from clear.

Plenary review is also unwarranted because the purported "conflict" identified in B&LE's petition already existed when this Court denied certiorari in *Pinney*.[16] In the five years since certiorari was denied in *Pinney*, no court of appeals has agreed with *Pinney*'s suggestion that *Keogh* might extend beyond overcharge rebate claims. At most, *Pinney* represents a divergence in the *application* of *Keogh* to a single, extremely complex factual setting that is unlikely ever to recur. For this reason, *Pinney* is unlikely to be of continuing significance. There is thus even less reason for plenary review now than there was when certiorari was denied in *Pinney*.

Furthermore, as B&LE informed the Court in opposing certiorari in *Pinney*, because rail rate bureaus no longer exist, issues of the sort raised in the petition will not recur with any frequency.[17] The regulatory landscape and the role of the ICC have been dramatically altered by congressional action removing rate regulation and reinstating competition in the transportation marketplace. It is thus particularly inappropriate for B&LE to argue that *Keogh* should now be *expanded* to insulate broad anticompetitive conspiracies, in an era of substantial *contraction* of rate regulation as a policy tool in the rail and trucking industries.

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[16] Aside from the ruling below, every other case rejecting the suggestion that *Keogh* applies beyond "overcharge" cases had already been decided prior to *Pinney*.

[17] Brief in Opposition in No. 88-72, at 3, 6, 12.

In short, there is simply no need for plenary review of whether *Keogh* should be expanded beyond its traditional and well-recognized limits.

B. There Is No Need For Plenary Review of the Court of Appeals' Holding That *Keogh* Does Not Bar Damages In Suits Brought By Competitors.

Nor should this Court grant review to consider B&LE's alternative claim that *Keogh* bars treble damages in suits brought by competitors, rather than customers, of a regulated carrier. That issue is not presented because *Keogh* does not apply at all to the exclusionary conduct injuring shippers *and* competitors on which the jury's damage awards were based. *See* Point I.A. *supra*. Review is unwarranted in any event because the Third Circuit's refusal to extend *Keogh* to competitor claims was plainly correct and in accord with settled law.

1. In *Keogh* itself, the Court held that "[t]he legal rights of *shipper as against carrier* in respect to a rate are measured by the published tariff." 260 U.S. at 163 (emphasis added). The Court made clear that "[u]nless and until suspended or set aside, this rate is made for all purposes, the legal rate, *as between carrier and shipper.*" *Id.* (emphasis added). Similarly, in *Square D*, the Court emphasized that "*Keogh* simply held that an award of treble damages is not an available remedy for *a private shipper* claiming that the rate submitted to, and approved by, the ICC was the product of an antitrust violation." 476 U.S. at 422 (emphasis added).

Notwithstanding the Court's obvious care in both *Keogh* and *Square D* to limit the *Keogh* damage bar to cases in which *shippers* claim overcharges, B&LE argues that the 1945 decision in *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945), extended the *Keogh* doctrine to competitor suits. That argument is plainly wrong.

The state of Georgia sought *damages* from the carrier only as a shipper and as *parens patriae* representative of other shippers. Georgia sought damages for itself only in

its "proprietary capacity" as "a shipper of goods and commodities." [18] Georgia sued the railroad on behalf of its citizens, *not* to recover lost income or profits, but to recover amounts paid to the railroad that were higher than the amounts the railroad would have been paid absent the conspiracy. The Court barred these damage claims solely because "[t]he legal rights of a *shipper* against a carrier in respect to a rate are to be measured by the published tariff." 324 U.S. at 453 (emphasis added).

The *Georgia* Court said *nothing* to indicate that *Keogh* would bar competitors' damage claims. Thus, *Georgia* cannot plausibly be read as extending *Keogh* to competitor suits. As the Third Circuit correctly noted in this case, "it is obvious that in rendering its decision the court's focus was on Georgia's claims as a customer." Pet. App. 37a & n.6.

This Court's rulings make clear that the policy justifications for *Keogh* simply do not apply in the competitor context.[19] Competitors such as the dock and truck plaintiffs seek damages resulting from lost profits and other business losses, *not* a rebate of customer overcharges resulting from the difference between rates charged and hypothetical rates that would have been charged by the carrier in the absence of an alleged antitrust activity. The dock and truck company plaintiffs in this case, for example, did not pay any rates, filed or otherwise, to the railroads. No rate payment is "exacted" from these

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[18] 1944 Term, Brief on Behalf of State of Georgia's Motion for Leave To File Amended Bill of Complaint at 7, 10, 27-28.

[19] As Judge Friendly noted in his opinion for the Second Circuit in *Square D*, in "suits by competitors rather than users of the service . . . many of the considerations relied upon in *Keogh* would not apply." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1352, 1356 (2d Cir. 1985). In addition, the difference between competitor claims and shipper claims was squarely brought to the attention of this Court in *Square D*, *see* Amicus Brief of C.D. Ambrosia Trucking Co. et al., in No. 85-21. Thus, the Court was clearly aware of that difference when it repeatedly described *Keogh* as a doctrine applicable to "private shippers."

competitors. *See Keogh,* 260 U.S. at 163. Because the competitors have paid nothing to the defendant, they obviously are not seeking rebates of overcharges. Like any competitor, the dock and truck company plaintiffs sought lost profits and business losses—well-established measurements of damages that do not raise the issues implicated in the customer context. Awarding such damages does not require any change in the rates set by the regulatory body. The competitor simply recovers for losses resulting from the antitrust violation.

2. The Third Circuit's ruling is also in accord with the well-recognized rule in the courts of appeals that *Keogh* does not apply to competitor suits. The rule was firmly established in the Third Circuit and elsewhere long before the present case. *See Essential Communications Systems, Inc. v. AT&T,* 610 F.2d 1114, 1116 (3d Cir. 1979). In *Essential,* the Third Circuit refused to extend *Keogh* to competitor claims, concluding that "the filed tariff rule has little or nothing to do with [a carrier's] duties under the antitrust laws toward its competitors . . . competitors are not the intended beneficiaries of that rule of public utility regulation." 610 F.2d at 1121. *Essential* recognized that "[t]here is no policy conflict, actual or potential, therefore, between the section 4 Clayton Act remedy and the anti-discrimination purposes of the filed tariff rule" because "[t]he Bell System will not be asked to disgorge to any customers any revenues derived under the filed tariff . . . [and] can continue to collect those revenues until a new tariff is filed." *Id.* at 1122.

In *City of Kirkwood v. Union Electric Co.,* the Eighth Circuit agreed with *Essential,* holding that "[a] rule formulated to ensure uniformity of rates as between customers should not give an unfair advantage to a utility in its dealings with competitors." 671 F.2d at 1179. The Second and Ninth Circuits have likewise concluded that *Keogh* does not bar competitor damage claims. *See City of Groton v. Connecticut Light & Power Co.,* 662

F.2d at 929; *Clipper Exxpress v. Rocky Mountain Tariff Bureau, Inc.*, 690 F.2d at 1267.[20]

3. Certiorari is not warranted to resolve the purported "conflict" between this well-established line of authority and the Sixth Circuit's application of *Keogh* to competitor claims in *Pinney*. For reasons discussed above, it is far from clear that *Pinney* presents a genuine conflict. *See* pages 18-19 *supra*. Even if *Pinney* presents a technical conflict on the competitor issue, guidance from this Court is not needed. When this Court considered the petition for certiorari in *Pinney*, the "conflict" between that decision and a well-established body of contrary authority already existed and this Court saw no need to grant review.[21] Nothing that has happened in the five years since certiorari was denied in *Pinney* should alter that judgment. No court of appeals has followed *Pinney* in extending *Keogh* to competitor claims—which is hardly surprising given rate deregulation. Indeed, this aspect of *Pinney* does not appear to have been applied in any other case even within the Sixth Circuit. B&LE's claim that the Fourth Circuit adopted this position in *Lifschultz* is incorrect, as demonstrated *supra* at pages 17-18.[22] Every dis-

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[20] B&LE's claim that there is a "conflict among the circuits concerning the application of *Keogh* to competitors' claims arising out of rates for electricity" is meritless. *See* Pet. at 19 n.13. The one case B&LE cites as creating the conflict, *Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990), *cert. denied*, 499 U.S. 931 (1991), did not even mention *Keogh*. *Concord* concluded, largely as a matter of economic theory, that the conduct at issue there did not violate the antitrust laws. Thus, *Keogh*, which bars damages for conduct concededly in violation of the antitrust laws, simply was not at issue. This Court's denial of certiorari in 1991 in *Concord* casts considerable doubt on B&LE's claim of a conflict: *City of Groton* and *Kirkwood*—the cases allegedly in conflict with *Concord*—were decided well before 1991.

[21] The Second, Third, Eighth and Ninth Circuit decisions refusing to extend *Keogh* to competitor suits all predated *Pinney*, and all postdated *Georgia v. Pennsylvania R.R. Co.*

[22] The competitor issue was not even mentioned by the Fourth Circuit, which merely noted that the district court held as an

trict court to consider the question, except the district court in *Lifschultz,* has rejected *Pinney*'s reasoning.[23] That one district court in the last five years has cited *Pinney* approvingly in an alternative holding certainly does not justify plenary review, for the reasons discussed *supra. Pinney*'s unwarranted extension of *Keogh* to competitor suits is plainly an aberration that has garnered no substantial following.[24]

II. B&LE'S *ILLINOIS BRICK* ARGUMENT IS INAPPLICABLE TO THE COMPETITOR PLAINTIFFS, AND INCORRECT WITH RESPECT TO THE STEEL COMPANIES.

B&LE alternatively suggests that the Court should grant certiorari to determine whether *Illinois Brick* [25] bars certain of the plaintiff steel companies' claims. As B&LE concedes *sub silentio,* its argument has no application to the competitor dock and truck plaintiffs, or to National Steel which owned its own fleet of self-unloaders. Even with respect to the other steel companies, the argument is meritless and provides no basis for granting certiorari.

"alternative ground" that the plaintiff's claims were barred because "the claims were collateral attacks on the rates and tariffs set before the Interstate Commerce Commission." 1993 WL 241742, at 2.

[23] *See, e.g., Capital Freight Serv., Inc. v. Trailer Marine Transport,* 704 F. Supp. 1190, 1197 (S.D.N.Y. 1989); *Frontier Enter., Inc. v. Amador Stage Lines,* 624 F. Supp. 137, 143 (E.D. Cal. 1985); *Delaware & Hudson Ry. Co. v. Conrail,* 654 F. Supp. 1195, 1205 (N.D.N.Y. 1987); *Marneel v. United States Parcel Service of America, Inc.,* 260 F. Supp. 391, 406 (N.D.Cal. 1966).

[24] As the United States noted in supporting *en banc* reconsideration before the Sixth Circuit in *Pinney, Pinney*'s position respecting competitor suits is "puzzling and wrong" and "threatens proper antitrust enforcement." Memorandum of the United States as Amicus Curiae in Support of Suggestion for Rehearing En Banc, *Pinney Dock and Transport Co. v. Penn Central Corp.* (6th Cir., filed March 23, 1988).

[25] *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 737, 744 (1977).

1. In *Illinois Brick*, this Court held that where a manufacturer illegally overcharged a direct purchaser, an indirect purchaser down the distribution chain could not recover under the antitrust laws on a claim that the "overcharge" had been "passed on" to it. B&LE did not argue in the trial court that *Illinois Brick* applied to the competitor plaintiffs. Similarly, in the Third Circuit, B&LE only argued that "[u]nder *Illinois Brick* and its progeny, *the steel company plaintiffs* are barred from recovering antitrust damages," but never challenged the dock and truck company verdicts, or the National Steel verdict, on this basis. (App. Br. at 38 (emphasis added)). *Accord id.* at 42-54 (same). In this Court, B&LE again argues only that *Illinois Brick* bars "the steel companies' award in this case." Pet. at 22; *see also id* at 23, 28.

B&LE thus may not obtain plenary review of the question whether *Illinois Brick* forecloses the damage awards to the dock and truck company plaintiffs, and to National. To the extent B&LE seeks review with respect to the competitor plaintiffs, its petition must be denied. It is clear, in any event, that *Illinois Brick* has nothing to do with the claims of the competitor plaintiffs. They claim that the railroad conspirators took numerous acts (e.g., refusal to lease docks to private operators that would allow trucking of iron ore; restrictions prohibiting such facilities from handling iron ore; etc.) that were specifically aimed at eliminating them as low-cost competitors. *See generally* ABA Antitrust Section, ANTITRUST LAW DEVELOPMENTS 654-55 (3d Ed. 1992) (*"Illinois Brick* does not preclude recovery by a plaintiff who is a competitor of the defendants rather than a purchaser and who does not seek to recover damages based on a passed-on overcharge").

2. B&LE's arguments for plenary review are also completely unpersuasive with respect to the shipper plaintiffs, the only plaintiffs against whom *Illinois Brick* was asserted below. B&LE argues that the court of appeals

subsumed *Illinois Brick*'s bright-line rule as a constituent part of the standing test established in *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*"), and then posits a split among the lower courts on this and related issues. This conflict, however, is entirely contrived.

Illinois Brick applies when a plaintiff's recovery requires proof of overcharges passed down through a chain of distribution. *See* ANTITRUST LAW DEVELOPMENTS, *supra*, at 654 (and cases cited therein). The application of *Illinois Brick* outside this passed-on overcharge context has not been an issue of significance in the lower courts—to the contrary, only sporadic lower court cases over the years have had occasion to even consider the matter.[26]

The factual record in this case simply does not raise an *Illinois Brick* issue with respect to the steel companies. The railroads' aim of preventing steel companies from taking advantage of alternative technology and competitors was achieved by a broad array of devices, including refusal to sell or lease property to nonrailroad dock operators, imposition of lease restrictions to prevent docks from handling iron ore from self-unloaders, refusing to provide competitive rail service from private docks, refusing to handle self-unloaders at railroad docks, and coercion against railroads which were considering a departure from the conspiracy. In seeking damages directly caused by this conduct, the steel companies demonstrated that they were *direct* purchasers of the railroad dock and transport services, and potential *direct* purchasers of the suppressed self-unloader and private dock transportation system. The evidence simply does not permit the conclusion that the steel companies were indirect purchasers.

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[26] *See, e.g., Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980); *Dart Drug Corp. v. Corning Glass Works*, 480 F. Supp. 1091, 1101 (D. Md. 1979); *Petrol Stops Northwest v. Continental Oil Co.*, 1978-2 Trade Cases ¶ 62,304 (D. Col. 1978).

B&LE thus has no plausible basis for arguing that the Third Circuit's ruling departs from this Court's prior holdings or demonstrates a circuit conflict. The Third Circuit did *not* hold that even where *Illinois Brick* applies, its bright-line rule may be ignored so long as the *AGC* standing test is satisfied. Instead, recognizing that the *Illinois Brick* rule did *not* apply on these facts, the Court appropriately undertook the standing analysis required by *AGC*. In doing so, the court of appeals *also* took into account the general concerns that underlie the *Illinois Brick* rule—precisely as this Court did in *AGC* itself. 459 U.S. at 543-44.

CONCLUSION

The petition should be denied.

Respectfully submitted,

LAWRENCE R. VELVEL
MICHAEL L. COYNE
27 Hickory Lane
Windham, NH 03087
Counsel for C.D. Ambrosia Trucking Company, Erie-Western Pennsylvania Port Authority and Codan Corporation

JERRY S. COHEN
ANN C. YAHNER
COHEN, MILSTEIN, HAUSFELD & TOLL
1401 New York Avenue, N.W.
Suite 600
Washington, D.C. 20005
Counsel for Tauro Brothers Trucking Company

BRUCE J. ENNIS, JR.*
DONALD B. VERRILLI, JR.
CARL S. NADLER
KIT A. PIERSON
THERESA A. CHMARA
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

* Counsel of Record

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